LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 24 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 559

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

EDWIN C. S. JOHNSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

THOMAS C. LYNCH, Attorney General of the State of California

DORIS H. MAIER, Assistant Attorney General of the State of California

EDSEL W. HAWS, Deputy Attorney General of the State of California

ARNOLD O. OVEROYE, Deputy Attorney General of the State of California
500 Wells Fargo Bank Building
Fifth Street and Capitol Mall
Sacramento, California 95814
Telephone: (916) 445-6115

Attorneys for Petitioner

printed in CALIFORNIA OFFICE OF STATE PRINTING

TOPICAL INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	
HISTORY OF THE CASE	3
FACTUAL STATEMENT	5
REASON FOR GRANTING THE WRIT	
CALIFORNIA EVIDENCE CODE SECTION 1235 DOES NOT CONFLICT WITH THE SIXTH AMENDMENT RIGHT OF A DEFENDANT IN A CRIMINAL PROCEEDING TO CONFRONT THE WITNESSES AGAINST HIM	8
CONCLUSION	19

TABLE OF AUTHORITIES CITED

Cases

Page

Bridges v. Wixon (1945) 326 U.S. 135, 89 L.Ed. 2103, 65 S.Ct. 1443 ---- 13, 14

Byrd v. United States (D.C.C. 1965) 342 F.2d 939 ---- 13

DiCarlo v. United States (2nd Cir. 1925) 6 F.2d 364, cert. denied, 268 U.S. 706 ---- 13, 14

Ellis v. United States (8th Cir. 1943) 138 F.2d 612 ---- 13

Kirby v. United States (1899) 174 U.S. 47, 43 L.Ed. 890, 19 S.Ct. 574 ---- 15

Maddox v. United States (1895) 156 U.S. 237, 39 L.Ed. 409, 15 S.Ct. 337 ---- 16, 17

Matthews v. United States (5th Cir. 1954) 217 F.2d 409 ---- 16

People v. Johnson (1968) 68 A.C. 674, 68 Cal.Rptr. 599, 441 P.2d 111 ---- 2, 5

People v. Johnson (1967) 257 A.C.A. 655, 64 Cal.Rptr. 875 ---- 1, 5

Pointer v. Texas (1965) 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065 ---- 15

Putnam v. United States (1896) 162 U.S. 687, 40 L.Ed. 1118, 16 S.Ct. 923 ---- 15

Robertson v. Baldwin (1897) 165 U.S. 275, 41 L.Ed. 715, 17 S.Ct. 326 ---- 15

Snyder v. Massachusetts (1934), 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330 ---- 16

State v. Saporen (1939) 205 Minn. 358 285 N.W. 898 ---- 14

United States v. Armone (2nd Cir. 1966) 363 F.2d 385 ---- 12

United States v. Block (2nd Cir. 1937) 88 F.2d 618 ---- 13

United States v. DeSisto (2nd Cir. 1964) 329 F.2d 929, cert. denied, 377 U.S. 979 ---- 11, 12

United States v. Graham (2nd Cir. 1939) 102 F.2d 436, cert. denied, 307 U.S. 643 ---- 14

United States v. Schwartz (E.D.Pa. 1966) 252 F.Supp. 866 ---- 12

Page

Constitution

United States Constitution, Sixth Amendment 2, 8, 18

Federal Statutes

28 U.S.C. § 1257(3) 2

California Statutes

Evidence Code § 770 ..... 2, 5, 9

Evidence Code § 1235 ..... 2, 3, 5, 8, 9, 10, 17, 18

Penal Code § 285 ..... 2, 3, 4

Penal Code § 1044 ..... 2, 17

Rules of Court

Revised Rules of the Supreme Court of the United States—Rule 22 2

Books and Periodicals

GARDNER, *The Participation And Memory Of Witnesses* 18 Corn. L. Q. 391 (1933) 15

LADD, *Impeachment Of One's Own Witnesses—New Developments* 4 U. Chi. L. Rev. 69 (1936) 11

MAGUIRE, EVIDENCE, Common Sense and Common Law (1947) 11

McCORMICK, *The Turncoat Witness: Previous Statements As Substantive Evidence* 25 Texas L. Rev. 573 (1947) 11

MORGAN, *The Hearsay Dangers And The Application Of The Hearsay Concept* 62 Harv. L. Rev. 177 (1948) 11

MORGAN, *The Law Of Evidence, 1941–1945* 59 Harv. L. Rev. 481 (1946) 11

WHITMER, *Psychology In Law*, c. 9, Gray et al. *Psychology In Use* p. 242 (2d Ed. 1951) 15

III WIGMORE, EVIDENCE, § 1018 (3d.Ed.) 11

V WIGMORE, EVIDENCE, § 1427 (3d.Ed.) 18

WITKIN, EVIDENCE, § 538 (2d. Ed.) 11

Preserving The Right To Confrontation—A New Approach To Hearsay Evidence In Criminal Trials 113 U. Pa. L. Rev. 741 (1965) 15

Miscellaneous

A. L. I., Model Code of Evidence Rule 503(b) 11

Uniform Code of Evidence, Rule 63(1) 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ----

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

EDWIN C. S. JOHNSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner, the People of the State of California, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case on May 28, 1968.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Third Appellate District, affirming respondent's conviction is set out in Appendix C and is reported as *People* v. *Johnson* (1967) 257 A.C.A. 655, 64 Cal. Rptr. 875. The granting of a hearing by the California Supreme Court on Feb-

ruary 23, 1968, vacated that opinion. The opinion of the California Supreme Court reversing respondent's conviction is set out in Appendix B and is reported as *People* v. *Johnson* (1968) 68 A.C. 674, 68 Cal. Rptr. 599, 441 P.2d 111.

JURISDICTION

The opinion of the Supreme Court of the State of California issued on May 28, 1968. Petitioner's timely application for rehearing was denied on June 26, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3) and Rule 22 of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Whether under the facts of this case California Evidence Code section 1235 authorizing the use of prior inconsistent statements as substantive evidence abridges the Sixth Amendment right of a defendant in a criminal case to be confronted with the witnesses against him?

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix A. They are:

California Evidence Code sections 770, 1235
California Penal Code sections 285, 1044
United States Constitution, Sixth Amendment

STATEMENT

HISTORY OF THE CASE

On February 7, 1964, an indictment was filed in the Superior Court of the State of California, in and for the County of Yolo, accusing respondent of incest in violation of California Penal Code section 285 (CT 3–4.[1] Respondent entered a plea of guilty to the charge (CT 10). Criminal proceedings were suspended and on March 16, 1964, respondent was found to be a mentally-disordered sex offender but one who would not benefit from care and treatment and one who was a menace to the health and safety of others (CT 12–13). After criminal proceedings were reinstated, respondent was sentenced to prison for the term prescribed by law (CT 13–14).

Thereafter on July 28, 1966, pursuant to the order of the United States District Court for the Northern District of California, in habeas corpus proceedings brought by respondent, the aforementioned proceedings were set aside (CT 29).

Respondent was duly rearraigned upon the 1964 indictment and informed of his constitutional rights. Upon respondent's motion to dismiss, a formal hearing was ordered by the court and set for August 10, 1966 (CT 30). On July 29, 1966, Robert J. Nareau was appointed as respondent's counsel (CT 31–32). On August 10, 1966, respondent's motion to set aside the

[1] CT refers to the Clerk's Transcript of the proceedings in the superior court below. A certified copy of said Clerk's Transcript is filed with this Court.

indictment was denied (CT 36). Other motions were considered and ruled upon by the court (CT 35–37). On September 15, 1966, after a continuance at respondent's request, pleas were entered and the Attorney General was substituted as counsel for the people (CT 45, 47).

Upon respondent's personal waiver of time for trial and motion by counsel for respondent, over the objections of the Attorney General, the court ordered trial by jury set for January 24, 1967 (CT 47).

On January 24, 1967, the cause came on for trial and proceeded day by day thereafter until February 1, 1967, when respondent was found guilty of incest in violation of California Penal Code section 285 as charged in the indictment (CT 73, 128; RT 532–535).[2] February 15, 1967 was ordered as the time and place for examination of respondent as an alleged mentally-disordered sex offender (CT 74).

On February 6, 1967, respondent filed a notice of motion for new trial which was set for hearing on February 15, 1967 (CT 129–130).

On February 15, 1967, respondent was found not to be a mentally-disordered sex offender nd criminal proceedings were reinstated (CT 131–132). Respondent's motion for new trial was denied (CT 132).

Application for probation was made with waiver of the two-day period for receipt of the report of the probation officer (CT 132). On February 17, 1967, pro-

[2] RT refers to the Reporter's Transcript of the proceedings in the superior court below. A certified copy of said Reporter's Transcript is filed with this Court.

bation was denied and respondent was sentenced to prison for the term prescribed by law (CT 134).

The court allowed respondent to be released on bail pending appeal (CT 134). Timely notice of appeal was filed on February 17, 1967 (CT 140).

After full appellate proceedings, on December 29, 1967, the Court of Appeal of the State of California, Third Appellate District, affirmed the conviction. *People* v. *Johnson, supra,* 257 A.C.A. 655; Appendix C.

Respondent's petition for hearing by the California Supreme Court was granted on February 23, 1968, and on May 28, 1968, that court reversed respondent's conviction. *People* v. *Johnson, supra,* 68 A.C. 674; Appendix B. On June 26, 1968, this petitioner's application for rehearing was denied.

FACTUAL STATEMENT

On the night of January 11, 1964, Elaine Johnson, aged 15, was at home where she lived with her parents and six brothers and sister (RT 59, 61, 246). She testified that on that night her father, the respondent, had fondled her breasts and private parts and that she had masturbated him (RT 63, 66–68). She also admitted isolated instances of sexual conduct short of intercourse on occasions prior to January 11, 1964 (RT 78, 82). At the trial, Elaine Johnson denied ever having sexual intercourse with her father (RT 62, 73–74).

Pursuant to Evidence Code sections 1235 and 770, the people then introduced evidence of prior inconsistent statements given under oath before the Yolo

County Grand Jury on February 7, 1964. This testimony revealed that on January 11, 1964, Elaine Johnson had sat up with her father after the family had retired (RT 70–71). Respondent had succeeded in undressing her and the two had sexual intercourse. Penetration was effected (RT 71). Elaine also testified to acts of sexual intercourse with respondent at least a half dozen times on occasions between June and September of 1963 when her mother was present (RT 75). Additional acts committed with respondent after her mother became aware of their relationship were committed at night, or when her mother was working (RT 77). Respondent had explained to Elaine that it was better for him to do it with her than to go out with a prostitute (RT 77).

In accounting for the difference in her testimony, Elaine Johnson alleged that her testimony before the grand jury had been suggested and coerced by former District Attorney Thomas Purtell who promised psychiatric care for respondent (RT 85, 143 et seq.).[3] She denied being interviewed by Lieutenant Gorman of the Sheriff's Office (RT 87).

Eleanor Johnson, wife of respondent, also testified (RT 242). At the trial she denied any knowledge of sexual activities of any sort between her daughter and respondent (RT 249–250). As with her daughter, Elaine, prior inconsistent statements before the Yolo

[3] Thomas Purtell testified that statements had been made to him, similar to the grand jury testimony, which statements were made without promises or requests to slant her testimory (RT 442–443).

County Grand Jury were introduced which revealed that she was aware of sexual activities between the two (RT 250). She first discovered this conduct in late 1961 when she walked into the bedroom and discovered respondent's hand inside the top of her daughter's pajamas (RT 251). Respondent told her that he had been intimate with Elaine (RT 251). He explained that Eleanor's working schedule made her absent and caused her to be tired as a result of which he got his sexual relief from Elaine in lieu of going outside the home. The difference in Eleanor's testimony was explained as an exaggeration (RT 251–253).

According to her grand jury testimony, respondent's wife made the effort to improve their relations to the point she became pregnant in February (RT 255–256). In August 1962, however, she discovered her daughter nude in bed with respondent (RT 258). This conduct was explained by respondent as caused by her tired condition occasioned by pregnancy (RT 259). Thereafter Eleanor would sometimes send Elaine to respondent at his request, on the pretense of taking some coffee to him (RT 259). At trial this testimony was again explained as an exaggeration; she frequently sent the children in with coffee or to see what her husband wanted.

There were also occasions when the three parties would be in bed together (RT 262). Sometimes Eleanor would leave (RT 261–262); other times she would remain (RT 262). Respondent would fondle the two of them and Eleanor observed Elaine and respondent

lying on top of one another (RT 264–266). In explanation of her testimony that she falsely accused respondent of incest (RT 268), Eleanor alleged that she had been coached by the district attorney who had told her that an incestuous relationship between respondent and Elaine would have to be shown if respondent were to get psychiatric treatment of any sort (RT 269).

Thereafter she staunchly maintained that Lieutenant Gorman of the Sheriff's Office had planted the seed of incest in her mind (RT 281, 289–291, 378). It subsequently appeared that Mrs. Johnson originally revealed respondent's conduct to Mrs. Griffis who had charge of the Yolo County Receiving Home for neglected and abandoned children (RT 432, 434–435). Eleanor appeared neither vindictive, spiteful, nor vengeful toward her husband when that disclosure was made (RT 434–436). Mrs. Griffis disclosed the facts to the authorities (RT 405, 436).

REASON FOR GRANTING THE WRIT

California Evidence Code Section 1235 Does Not Conflict With the Sixth Amendment Right of a Defendant in a Criminal Proceeding to Confront the Witnesses Against Him

It is the petitioner's contention that the California Supreme Court has improperly interpreted the Sixth Amendment's guarantee of the right of confrontation to a defendant and improperly invalidated the state statute.

The California court ruled that California Evidence Code section 1235, which makes inconsistent statements of a witness admissible for the truth of the matters therein asserted, violates the Sixth Amendment's guarantee of the right of confrontation when introduced against the defendant in a criminal prosetion. (Appendix B, page 1.)

California Evidence Code section 1235 (Stats. 1965, c. 299) which became effective January 1, 1967, provides:

> "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

Section 770 provides:

> "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
>
> "(a) The witness was so examined while testifying as to give him an opportuniy to explain or to deny the statement; or
>
> "(b) The witness has not been excused from giving further testimony in the action."

The California Supreme Court held that reversible error was committed where defendant's absence and lack of counsel at a grand jury hearing had denied him his right of prompt cross-examination on the grand jury statements, where no other evidence of actual intercourse was introduced to prove the crime

of incest, and where such evidence, at the trial itself, was recanted by the wife and daughter. The court reasoned that, regularly, cross-examination should immediately follow direct examination.

On the other hand, the Code Commissioner's Comments which are reprinted as part of the code, recognize that the presence of the same witness at the trial assures the right of cross-examination as to the making of all statements. They provide:

> "Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case."

See also WITKIN, EVIDENCE § 538 (2d Ed.).

The philosophy of this provision has long been defended by scholars and text writers. See, e.g., LADD, *Impeachment Of One's Own Witnesses—New Developments,* 4 U. Chi. L. Rev. 69 (1936); MAGUIRE, EVIDENCE, *Common Sense And Common Law,* at pages 59–63 (1947); McCORMICK, *The Turncoat Witness: Previous Statements As Substantive Evidence,* 25 Texas L. Rev. 573 (1947); III WIGMORE, EVIDENCE, § 1018; MORGAN, *The Hearsay Dangers And The Application Of The Hearsay Concept,* 62 Harv. L. Rev. 177 (1948) at 192–196; MORGAN, *The Law Of Evidence, 1941–1945,* 59 Harv. L. Rev. 481 (1946), at 545–555. See also, A.L.I., Model Code of Evidence Rule 503(b); Uniform Code of Evidence, Rule 63(1).

Independent of the statutory authorization found in this case, the philosophy has also been recognized by case law. The Second Circuit Court of Appeals in *United States* v. *DeSisto* (1964) 329 F.2d 929, *cert. denied,* 377 U.S. 979, gave substantive effect to a prior identification of the accused to supply an element in support of a jury verdict. Squarely faced with the question of the evidentiary status of prior inconsistent statements, the court said, at page 933:

> "The rule limiting the use of prior statements by a witness subject to cross-examination to their effect on his credibility has been described by eminent scholars and judges as 'pious fraud,' 'artificial,' 'basically misguided,' 'mere verbal ritual,' and an anachronism 'that still impede(s) our pur-

suit of the truth.' [Citations omitted.] The sanctioned ritual seems peculiarly absurd when a witness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge on his second; to tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this orthodox rule defies the dictate of common sense that "The fresher the memory, the fuller and more accurate it is. * * * Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy * * * [but] the greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to each of these influences.' McCormick, Evidence 75–76 (1954). . . ."

Thus the trier of fact is given the option of either rejecting both statements or accepting the latter statement or the prior statement. The result has been justified by noting that the dangers against which the hearsay rule is directed are nonexistent because the witness is present and subject to cross-examination, and in *DeSisto,* as here, the witness's previous testimony was under oath. See also *United States* v. *Armone* (2nd Cir. 1966) 363 F.2d 385 [*DeSisto* followed]; *United States* v. *Schwartz* (E.D.Pa. 1966) 252 F.Supp 866.

Notwithstanding the above authority, the California Supreme Court stated, "We find in these opinions, however, no satisfactory explanation of how a belated opportunity to cross-examine a witness as to the truth of a prior inconsistent statement may be deemed 'adequate'." (Appendix B, page 17.)

The federal circuits have reflected a sharp divergence of opinion on the issue. Particularly, the District of Columbia Circuit, *e. g., Byrd* v. *United States* (1965) 342 F.2d 939, and the Eighth Circuit, *e.g., Ellis* v. *United States* (1943) 138 F.2d 612, have not followed the Second Circuit in departure from the traditional rule. Those decisions, however, have only sought to show that the policy of California Evidence Code section 1235 is unsupported by authority. They have not demonstrated any fallacy in the philosophy itself.

This Court in *Bridges* v. *Wixon* (1945) 326 U.S. 135, 89 L.Ed. 2103, 65 S.Ct. 1443, also expressed adherence to the traditional rule but the Court was also faced with an immigration service regulation which dictated the result therein. The Court also relied in part on *United States* v. *Block* (2nd Cir. 1937) 88 F.2d 618, 620, which retreated from the earlier case of *Di Carlo* v. *United States* (1925) 6 F.2d 364, *cert. denied*, 268 U.S. 706. Judge Learned Hand in *Di Carlo* had espoused the principles of California Evidence Code section 1235. Subsequently the Second Circuit abandoned *Block* and returned

to the position of Judge Hand in *Di Carlo. United States* v. *Graham* (2nd Cir. 1939) 102 F.2d 436, *cert. denied,* 307 U.S. 643. The *Bridges* decision should be reexamined on this issue. Furthermore, a critical distinction exists in this case for the prior statements were transcribed while the witnesses were testifying under oath before the grand jury. As the opinion in *Bridges* observed, this factor affords protection against mistakes in hearing, mistakes in memory, mistakes in transmission. An important safeguard is present—the fear of prosecution for perjury.

The only case attempting to meet the arguments in support of California Evidence Code section 1235 is *State* v. *Saporen* (1939) 205 Minn. 358, 285 N.W. 898, upon which the California Supreme Court relied. *Saporen* noted *inter alia* the absence of an oath and consequent lack of liability to punishment for perjury. The deficiency is supplied in this case for the prior inconsistent grand jury testimony was given under oath. A second factor noted in *Saporen* was the lack of immediate opportunity for cross-examination. But another virtue of cross-examination is in its opportunity to require the witness to explain the discrepancies of conflicting statements and when this process is afforded, it seems that the earlier statement should at least stand on equal footing with the others. The two questioners have the opportunity to lay bare the source of the change of face, in forgetfulness, carelessness, pity, terror, or

greed.[4] The witness is present and the trier can observe his demeanor as explanations are proffered.

The Sixth Amendment right of confrontation cannot require immediate confrontation and cross-examination concurrent with the making of the statements. It should be enough that the original statement is contemporaneous with the event to which it relates. *C.f., Putnam* v. *United States* (1896) 162 U.S. 687, 40 L.Ed. 1118, 16 S.Ct. 923. This is apparent from this Court's recognition and continuing approval of hearsay exceptions which provide no such opportunity. The most patent example and one consistent with the Sixth Amendment is the recognized exception for dying declarations. *Kirby* v. *United States* (1899) 174 U.S. 47, 43 L.Ed. 890, 19 S.Ct. 574; *Robertson* v. *Baldwin* (1897) 165 U.S. 275, 282, 41 L.Ed. 715, 17 S.Ct. 326. This exception has been approved as recently as *Pointer* v. *Texas* (1965) 380 U.S. 400, 407, 13 L.Ed.2d 923, 85 S.Ct. 1065. It has persevered notwithstanding vigorous condemnation by critics who assail its reliability. See, *e.g., Preserving The Right To Confrontation—A New Approach To Hearsay Evidence In Criminal Trials,* 113 U. Pa. L. Rev. 741, 749–751 (1965).

But the courts have stated that the constitutional right of confrontation may not be invoked to ex-

[4] The prior inconsistent statement probably has greater credibility on the theory that memory hinges upon recency. Psychology's opinion is in accord. WHITMER, *Psychology In Law,* c. 9, Gray et al., *Psychology In Use,* (2d. 1951) at 242. See also GARDNER, *The Participation And Memory Of Witnesses,* 18 Corn. L. Q. 391, 392 and 394 (1933).

clude evidence otherwise admissible under well-settled hearsay exceptions and doesn't prevent the creation of new exceptions based upon real necessity and adequate guarantees of trustworthiness. *Matthews* v. *United States* (5th Cir. 1954) 217 F.2d 409, 418.

Justice Benjamin N. Cardozo has observed that "The exceptions are not . . . static, but may be enlarged from time to time if there is no material departure from the reason of the general rule." *Snyder* v. *Massachusetts* (1934) 291 U.S. 97, 107, 78 L.Ed. 674, 54 S.Ct. 330. If the accused has a reasonable opportunity effectively to rebut the effect of the hearsay and if the likelihood of an inaccurate report of the facts seems slight, the hearsay can be admitted. 113 U. Pa. L. Rev., *supra,* at 748; compare, *Maddox* v. *United States* (1895) 156 U.S. 237, 39 L.Ed. 409, 15 S.Ct. 337.

An adequate guarantee of trustworthiness is supplied in this case by the vehicle of cross-examination. There is no question in this case that the prior inconsistent statements were made. There is no possibility that they were inaccurate. It is difficult to imagine a more searching cross-examination than was utilized in this case. Not only was counsel able to inquire concerning the fact of the statements before the grand jury but also he was able to impeach for bias and prior inconsistency. See RT 85, 101–105, 124–125, 143,

149–150, 173, 257, 269, 333–334. In brief, there was nothing that couldn't be done in this trial that could be done in the trial of any other criminal case. Further enhancing reliability in California is California Penal Code section 1044 which commits control of the proceedings to the trial judge and sanctions comment on the weight of the evidence.

The purpose of cross-examination is to ascertain the truth. The aim of justice should be no less. The need for this testimony is on a par with that of dying declarations. It affords needed protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence material to his case. This need is appreciated from recognition of the arbitrary incidence of the "orthodox" rule when the impeaching party does not have the burden of proof. Thus, whether or not the impeaching evidence is regarded as substantive, it can be used under the California Supreme Court's decision by a defendant to negate a witness's testimony. But in the reverse situation, the people or the plaintiff is not entitled to go to the jury. The observation in *Maddox*, *supra*, 156 U.S. at 243, that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be accorded the accused is apposite.

In Evidence Code section 1235, California has enacted progressive legislation. In so doing, California has followed the lead of respected and forward-looking authorities whose proposals have emanated at once

from practical and astute appreciation of the underlying problems. Evidence Code section 1235 is but one of several provisions which has as its goal a more enlightened and realistic ascertainment of the truth for all parties while at the same time preserving essential safeguards. It represents a move away from the needless obstruction to investigation of the truth which Wigmore attributes to the hearsay rule because of the inflexibility of its exceptions. V WIGMORE, EVIDENCE, § 1427, p. 209 (3d.Ed.). The widespread adoption of new proposals for national use reflected by the American Law Institute and the National Conference of Commissioners on Uniform State Laws attests to the present and urgent need for this Court to resolve this question.

It is submitted that the opinion of the California Supreme Court in rejecting this progressive statute of California solely on the ground of its alleged violation of the Sixth Amendment's right to confrontation was erroneous. It represents an incorrect interpretation of the scope of that amendment where the means to test the veracity of the witness is assured at the time of trial. Here, as the record shows, the respondent had and did exercise his right of cross-examination at trial. There was no violation of the Sixth Amendment right to confrontation.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. LYNCH
Attorney General
of the State of California

DORIS H. MAIER
Assistant Attorney General
of the State of California

EDSEL W. HAWS
Deputy Attorney General
of the State of California

ARNOLD O. OVEROYE
Deputy Attorney General
of the State of California

Attorneys for Petitioner

APPENDIX A

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

California Evidence Code section 770

§ 770. Evidence of inconsistent statement of witness. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

(b) The witness has not been excused from giving further testimony in the action. (Stats. 1965, c. 299, § 770.)

California Evidence Code section 1235

§ 1235. Inconsistent statement. Evidence of a statement hade by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770. (Stats. 1965, c. 299, § 1235.)

Comment—Law Revision Commission

Under existing law, when a prior statement of a witness that is inconsistent with his testimony at the trial is admitted in evidence, it may not be used as evidence of the truth of the matters stated. Because of the hearsay rule, a witness' prior inconsistent statement may be used only to discredit his testimony given at the trial. Albert v. McKay & Co., 174 Cal. 451, 456, 163 Pac. 666, 668 (1917).

Because a witness' inconsistent statement is not substantive evidence, the courts do not permit a party —even when surprised by the testimony—to impeach his own witness with inconsistent statements if the witness' testimony at the trial has not damaged the party's case in any way. Evidence tending only to discredit the witness is irrelevant and immaterial when the witness has not given damaging testimony. People v. Crespi, 115 Cal. 50, 46 Pac. 863 (1896); People v. Mitchell, 94 Cal. 550, 29 Pac. 1106 (1892); People v. Brown, 81 Cal.App. 226, 253 Pac. 735 (1927).

Section 1235 permits an inconsistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible under the conditions specified in Section 770—which do not include surprise on the part of the party calling the witness if he is the party offering the inconsistent statement. Because Section 1235 permits a witness' inconsistent statements to be considered as evidence of the matters stated and not merely as evidence casting discredit on the witness, it follows that a party may introduce evidence of inconsistent statements of his own witness whether or not the witness gave damaging testimony and whether or not the party was surprised by the

testimony, for such evidence is no longer irrelevant (and, hence, inadmissible).

Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

California Penal Code section 285

§ 285. Incest

Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison not less than one year nor more than fifty years. (Enacted 1872. As amended Stats. 1921, c. 101, p. 96, § 1.)

California Penal Code section 1044

§ 1044. Control of proceedings by judge; restriction of evidence and argument to relevant and material matters.

It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. (Added Stats. 1927, c. 607, p. 1040, § 1.)

APPENDIX B

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, *Plaintiff and Respondent,* v. EDWIN C. S. JOHNSON, *Defendant and Appellant.*	CRIM. 11964

This appeal from a judgment of conviction of incest (Pen. Code, § 285) presents the important question whether section 1235 of the new Evidence Code, making prior inconsistent statements of a witness admissible *for the truth of the matters therein asserted,* violates the Sixth Amendment's guarantee of the right of confrontation when introduced against a defendant in a criminal prosecution. We conclude that the statute cannot constitutionally be so applied, and that it was prejudicial error to do so in the case at bar.

The chronology of events is as follows: On February 7, 1964, defendant's wife and 15-year-old daughter Elaine appeared under subpoena before the Yolo County Grand Jury. Defendant, of course, was neither present in person nor by counsel. Elaine testified that defendant engaged in an act of sexual intercourse with her on January 11, 1964, and on a number of earlier occasions; Mrs. Johnson testified that at various times

she was present when her husband and Elaine participated in sex play, and acts of intercourse could have taken place. The grand jury returned an indictment charging defendant with incest committed on January 11, 1964. He first entered a plea of guilty; after he had served some two years and eight months in prison, his plea was set aside by order of the federal district court because of constitutionally inadequate representation of counsel. Upon rearraignment defendant entered a plea of not guilty, and the cause went to trial in January 1967.

The prosecution's principal witnesses were to be Elaine and Mrs. Johnson. When called to the stand, however, both recanted and flatly denied that the alleged acts of sexual intercourse had taken place. In particular, Elaine testified that on January 11, 1964, defendant touched her breasts and private parts and she masturbated him, but that she did not engage in sexual intercourse with him on that or any other date. The prosecutor was then allowed to read, in the presence of the jury, those portions of the transcript of Elaine's testimony before the grand jury in which she asserted she had intercourse with defendant on the night in question and the prior occasions. Elaine testified that her grand jury testimony was not true, explaining that it was given when she was only 15 years old and under great emotional stress; that she had become angry at and afraid of defendant because he had severely beaten both her and her mother; that after defendant was arrested on a wife-beating charge the district attorney suggested to her that if she would "play our game" defendant would be committed to a psychiatric hospital for treatment, but if she refused, "he will come home and next time anything happens we are not going to help you."

On cross-examination Elaine testified that she had also become incensed at defendant because in the previous November he had falsely accused her of being involved in a high school sex and narcotics ring, caused her to be physically examined by health authorities for evidence of such activities, and reported this alleged misconduct to the district attorney.

Over defendant's objection, the transcript of Elaine's testimony before the grand jury was admitted into evidence.

When Mrs. Johnson was called to the stand she testified that she had no knowledge of any sexual activities having occurred between defendant and Elaine. Again the prosecutor was allowed to read portions of the testimony given by Mrs. Johnson before the grand jury, in which she described both observing and participating in such activities. Mrs. Johnson testified that her grand jury testimony was not true, explaining that at the time she related it she harbored feelings of jealousy and vindictiveness towards defendant; that she believed he was in need of psychiatric treatment; that the district attorney advised her a simple wife-beating charge would not suffice to have defendant committed to a mental hospital, and "it would be necessary for me to show that my husband had committed an incestuous act with my daughter." She added that she had been reluctant to so testify but was repeatedly coached by the district attorney prior to the grand jury hearing, and that during the period of defendant's imprisonment on his invalid plea of guilty she frequently informed the authorities by affidavit that he had not in fact committed any acts of sexual intercourse with Elaine.

Pressed further, Mrs. Johnson conceded that another reason why she had wanted to have defendant removed from their home was her desire to pursue a budding illicit relationship with a certain family acquaintance, and that the beating she received from defendant on the night of January 15, 1964, was provoked by her admission of this clandestine affair. She acknowledged that she thereupon took refuge at the county receiving home managed by Mrs. Joanne Griffis, but her testimony as to whether she told Mrs. Griffis of any sexual misconduct by defendant was equivocal.[1] She further testified that the idea of accusing defendant of incest was planted in her mind a few days later by Lieutenant Gorman, an investigator for the sheriff's office, who assertedly told her that defendant had made a confession of that crime.

Again over defendant's objection, the transcript of Mrs. Johnson's testimony before the grand jury was admitted into evidence.

Lieutenant Gorman then testified that at an interview on January 16, 1964, Elaine stated to him that she had engaged in sexual intercourse with defendant on January 11 and a number of earlier occasions. He further testified that at an interview on January 17, Mrs. Johnson stated to him that she had observed and participated in sexual activities involving Elaine and defendant. He denied telling Mrs. Johnson that defendant had confessed to the offense of incest.

---

[1] When asked several times if she had made an accusation of this nature to Mrs. Griffis, Mrs. Johnson responded with such answers as the following: "I don't remember. As I say, I was very overwrought. I don't remember what I said to her. I don't doubt that I said many things against him because I was feeling so vindictive and so hateful toward him, I would have said anything that night. I really can't remember what I specificially—what I did say to her."

Mrs. Griffis testified that during the night of January 15, 1964, Mrs. Johnson came to her home and said she had discovered that defendant and Elaine were having intimate relations, and that she herself had subsequently participated in such activities. According to Mrs. Griffis, Mrs. Johnson was in a bruised and frightened condition but appeared neither "vindictive" nor "hateful."

Finally, Thomas Purtell, who had been district attorney at the time of the events in question, testified that prior to the grand jury hearing he had numerous interviews with Mrs. Johnson and Elaine in which both gave him statements similar to their subsequent grand jury testimony. He denied making any suggestions that they testify falsely, or any promises that if defendant were convicted he would receive psychiatric treatment. He acknowledged, however, that throughout these interviews Mrs. Johnson displayed fear of defendant and a concern that he receive such treatment. Similar testimony was given by James Calloway, who had been Mr. Purtell's deputy during this period.

Section 1235 of the new Evidence Code, effective January 1, 1967, provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."[2] Section 1235 thus abrogates the formerly well-settled rule that a prior inconsistent statement of a witness is admissible only for the limited purpose of impeachment (e.g., People v. Orcalles (1948) 32 Cal.2d 562, 572–573; People v.

[2] Section 770 merely requires that the witness be given an opportunity to explain or deny the prior statement at some point in the trial.

Ballard (1963) 218 Cal.App.2d 295, 309), and declares such a statement to be substantive evidence of the truth of the matters therein asserted. It is, in short, a new statutory exception to the hearsay rule.[3]

The trial court ruled that section 1235 governed in this case, and instructed the jury that "testimony given by a witness at a prior proceeding has been read to you from the reporter's transcript of that proceeding. You are to consider such testimony in the same light and in accordance with the same rules which you have been given as to testimony of witnesses who have testified here in court." Although this instruction (CALJIC No. 37 (rev.)) was technically inapposite because it relates rather to the "former testimony" exception to the hearsay rule, it did serve to present the prosecution's theory that the grand jury testimony of Elaine and Mrs. Johnson was admissible for the truth of the matters therein asserted.[4]

Defendant contends that by authorizing the use of the prior inconsistent statements of Elaine and Mrs. Johnson as substantive evidence of his guilt, section 1235 deprived him of his right of confronta-

[3] The Evidence Code also abolishes the requirement of a foundation (§ 769), and allows a party to impeach his own witness even though the latter's testimony was neither surprising nor damaging (§ 785; see also § 1235, comment of Law Revision Com.) In the present case there was in fact no surprise: it appears from the pretrial proceedings in chambers that the prosecutor expected Elaine and Mrs. Johnson to change their testimony, and the applicability of section 1235 was debated at that time.

[4] The instruction did not, of course, apply to their *extrajudicial* prior inconsistent statements reported by Lieutenant Gorman, Mrs. Griffis, Mr. Purtell and Mr. Calloway, but neither were the jury given any instruction (e.g., CALJIC No. 54-A) limiting such statements to impeachment purposes. It appears the trial court intended the quoted instruction to somehow cover both kinds of prior inconsistent statements introduced.

tion guaranteed by the Sixth Amendment to the United States Constitution.[5]

We begin with Pointer v. Texas (1965) 380 U.S. 400. In that case a preliminary hearing was held at which one Phillips, chief witness for the prosecution, identified Pointer as the man who had robbed him at gunpoint; Pointer, for whom counsel had not been appointed, did not cross-examine. Phillips thereafter left the jurisdiction permanently, and at the trial for robbery the prosecution was allowed to introduce a transcript of his former testimony as evidence against the defendant. Pointer's claim of a denial of his right of confrontation was rejected by the trial court on the ground, in part, that his physical presence at the preliminary hearing had provided him with "the opportunity of cross-examining" the witness if he so desired.

Reversing the judgment of conviction, the United States Supreme Court emphasized (at p. 405 of 380 U.S.) that "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal," and accordingly declared (at p. 406) that the Sixth Amendment's guarantee of that right was enforceable against the states through the Fourteenth Amendment.

---

[5] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." Penal Code section 686 similarly declares that "In a criminal action the defendant is entitled: . . . to be confronted with the witnesses against him, in the presence of the court. . . ."

Turning to the facts before it, the high court held that Pointer's mere physical opportunity to undertake a cross-examination without the assistance of counsel was inadequate to satisfy the confrontation requirement. The court sharpened the distinction by reasoning (at p. 407) that "The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." The court then held that "Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips," its introduction invalidated the conviction under the Sixth and Fourteenth Amendments. (Accord, Douglas v. Alabama (1965) 380 U.S. 415.)

In *Pointer* the challenged evidence was introduced under the "former testimony" exception to the hearsay rule. The statutes and cases dealing with that exception are persuasive guidelines for an appraisal of section 1235: once the primary condition for admitting such testimony in the subsequent trial has been met—unavoidable absence of the witness, in "former testimony" cases; inconsistency with present testimony, in section 1235 cases—the evidence may be considered by the jury for the truth of the matters therein asserted. Yet as *Pointer* demonstrates, such former testimony will nevertheless be excluded if the defendant was not afforded a constitutionally "adequate" opportunity to cross-examine the declarant at the time the testimony was given.

This fundamental rule is embodied in our statutes. Former Penal Code section 686, subdivision 3, declared to be admissible any testimony given at a preliminary hearing or a former trial on the merits in the presence of a defendant "who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness. . . ." Applying this rule, testimony given at a preliminary hearing at which the defendant's counsel had cross-examined the witness "at considerable length and without obstacle or curtailment of the right" was held admissible in a subsequent trial in People v. Dozier (1965) 236 Cal.App.2d 94, 100–105. By contrast, testimony given at a preliminary hearing at which the defendant's right to cross-examine was restricted by an erroneous ruling was held inadmissible in People v. Redston (1956) 139 Cal.App.2d 485, 494–496. And, *a fortiori,* we held in People v. Hillery (1965) 62 Cal. 2d 692, 708, that the transcript of statements made by a witness before a grand jury was inadmissible as "former testimony," since there had been no opportunity whatever to cross-examine at such a proceeding. The challenged testimony in the case before us, it will be remembered, was likewise elicited at a grand jury hearing from which defendant and his counsel were excluded.

The current statutory provisions in this regard are found in Evidence Code sections 1291 and 1292. Section 1291 makes former testimony admissible when offered against a person who was a party to the proceeding in which it was originally given. This was the preexisting rule, although it is now more broadly stated. Section 1292 creates a new exception, allowing the use of former testimony even against a person who was not a party to the earlier proceeding if the issue is

such that the party at that proceeding "had the right and opportunity to cross-examine the declarant with an interest and motive similar to" that possessed by the party at the subsequent trial.

The important point for our purposes is that section 1292 is limited on its face to "a civil action." As the comment of the Assembly Committee on the Judiciary explains, "Section 1292 does not make former testimony admissible in a criminal case. This limitation preserves a right of a person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty is at stake—as it is in a criminal action—the defendant should not be compelled to rely on the fact that another person has had an opportunity to cross-examine the witness." This reasoning applies even more forcefully to the present case: from the standpoint of the right to cross-examine, defendant was simply not a "party" to the earlier (grand jury) proceeding. No one was present at that proceeding with "an interest and motive" similar to his, and no one had "an opportunity to cross-examine the declarant." If section 1292 is inapplicable to criminal prosecutions for this reason, it would seem that section 1235 should be likewise excluded.

There remains, of course, a major distinction between "former testimony" cases and section 1235 cases: in the latter the declarant is also a witness available for cross-examination at the subsequent trial. Indeed, it is because of this availability that academic writers have long urged that prior inconsistent statements of a witness could be admitted for the truth of the matters therein asserted without violating the hearsay rule. (See, e.g., McCormick, Evidence (1954)

§ 39; 3 Wigmore, Evidence (3d ed. 1940) § 1018; Morgan, *The Hearsay Dangers and the Application of the Hearsay Concept* (1948) 62 Harv.L.Rev. 177, 192–196; Morgan, *The Law of Evidence, 1941–1945* (1946) 59 Harv.L.Rev. 481, 545–550; Uniform Rules of Evidence, rule 63(1); Model Code of Evidence, § 503(b).) Adopting this viewpoint, the draftsmen of section 1235 justify their new rule on the ground that it "admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. . . . [6] The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court." (Evid. Code, § 1235, comment of Law Revision Com.; cf. Evid. Code, § 1202, and comment thereto.)

---

[6] At this point a somewhat more speculative justification is also offered by the commission: "In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation." We have recognized that this argument is persuasive for the limited purpose of admitting an extrajudicial eyewitness identification as substantive evidence of identity. (People v. Gould (1960) 54 Cal.2d 621, 626.) In that context the freshness of the witness' recollection is obviously crucial, for the in-court identification could well be the product of the extrajudicial identification. (See, e.g., People v. Caruso (1968) 68 A.C. 181.)

In the case at bar identification is not in issue. Here it is urged that the early testimony was the product of anger and vengeance, and the later testimony more reflective and therefore more accurate.

We cannot share the optimism of this reasoning. As Maguire has candidly admitted, "many trial lawyers will have none of this. They say it is a professorial pipe-dream. They have in mind considerations of practical policy. . . ." (Maguire, Evidence: Common Sense and Common Law (1947) p. 59.) Perhaps the foremost practical objection to the academic approac' is that it grossly underestimates the value of one of the characteristics which make cross-examination "the greatest legal engine ever invented for the discovery of truth." (5 Wigmore, *op. cit. supra,* at p. 29.) To assert that the dangers of hearsay are "largely non-existent" when the declarant can be cross-examined at some later date, or to urge that such a cross-examination puts the later trier of fact "in as good a position" to judge the truth of the out-of-court statement as it is to judge contemporary trial testimony, is to disregard the critical importance of *timely* cross-examination. It is the general rule that "Regularly, cross-examination should immediately follow direct examination. While it may be postponed by the court, this may not be done to the injury of the one having the right to cross-examine." (58 Am.Jur., Witnesses, § 665; cf. People v. Manchetti (1946) 29 Cal.2d 452, 461.) For the reason of this rule, we need look no further than Wigmore's emphasis on the fact that "the cross-examination *immediately succeeds* in time the direct examination. In this way the modification or the discredit produced by the facts extracted is more readily perceived by the tribunal. No interval of time elapses, to diminish or conceal their force." (Italics in original.) (5 Wigmore, *op. cit. supra,* at p. 34.) This practical truth is daily verified by trial lawyers, not one of whom would willingly postpone to both a

later date and a different forum his right to cross-examine a witness against his client. (See generally, Friedman, Essentials of Cross-examination (Cont.Ed. Bar 1968); Stanbury, California Trial and Appellate Practice (1958) pp. 485–491.)

Virtually every court of the Anglo-American legal system has declined to adopt the academic position here under discussion. (See cases collected in Note, 133 A.L.R. 1454 et seq.) In the leading case of State v. Saporen (Minn. 1939) 285 N.W. 898, 900–901, the court reasoned: "The rule is well settled that the only office of impeaching testimony of this kind is to negative or neutralize the testimony to which it is directed. (It may also discredit the witness as such.) [Citations.] That is what Dean Wigmore calls the orthodox and 'universally maintained' rule of American decision law. Although approved in the first (§ 1018), it is disapproved in the second edition of Wigmore, Evidence (§ 1018). The disapproval of the learned author is put upon the ground that the impeached witness testifies finally under oath and subject to cross examination. Hence, he concludes, 'The whole purpose of the Hearsay rule has been already satisfied,' and so 'there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve.'

"That, we submit with deference, is not enough to qualify the previous contradictory assertion as substantive evidence." After observing that the witness' oath does not solemnize his prior extrajudicial statement, the opinion turns to the alleged adequacy of the belated cross-examination of the witness: "The chief

merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth." (Italics added.)

The only contrary authority cited to us are decisions of the United States Court of Appeal for the Second Circuit. (United States v. De Sisto (2d Cir. 1964) 329 F.2d 929, 932–934, and cases cited; see also United States v. Schwartz (E.D. Pa. 1966) 252 F. Supp. 866; but see United States v. Ploof (2d Cir. 1963) 311 F.2d 544, 546.) We find in those opinions, however, no satisfactory explanation of how a belated opportunity to cross examine a witness as to the truth of a prior inconsistent statement may be deemed "adequate."[7] The Second Circuit, moreover, appears to stand alone in adopting the academic position. The Court of Appeals for the District of Columbia Circuit has expressly refused to follow *De Sisto* (Byrd v. United States (D.C.Cir. 1965) 342 F.2d 939, 940), and the

[7] Thus in *De Sisto*, the leading Second Circuit case, the court emphasized that both grand jury testimony and testimony at a former trial are given under oath, and that the latter is also given subject to cross-examination (p. 934 of 329 F.2d); but the opinion is silent on the fact that of these two, grand jury testimony is *not* subject to cross-examination. We further note that the actual holding in *De Sisto* was simply that an extrajudicial eyewitness identification is admissible as substantive evidence, a rule we declared in California four years earlier (see fn. 6, *ante*).

other federal appellate courts also adhere to the orthodox rule (e.g., Brooks v. United States (10th Cir. 1962) 309 F.2d 580, 582; United States v. Bernard (7th Cir. 1961) 287 F.2d 715, 723; Valentine v. United States (5th Cir. 1959) 272 F.2d 777, 778; Clifton v. United States (4th Cir. 1955) 224 F.2d 329, 331; United States v. Michener (3d Cir. 1945) 152 F.2d 880, 884 fn. 3).

In a recent decision the Eighth Circuit once again took the occasion to reject the academic position: "This court has respectfully demonstrated this viewpoint to be 'acknowledged heterodoxy.' Ellis v. United States, 8 Cir., 138 F.2d 612, 617. The *Ellis* case was decided in 1943. Almost a quarter of a century later the empirical judgment of all courts, both state and federal, still follow the orthodox view, contrary to the liberal suggestions early espoused by Dean Wigmore. See 3 Wigmore, § 1018 (3rd ed. Supp. 1964). *The right to confront the witness at the time the statements are made is paramount in a criminal trial. U. S. Const. Amend. VI.*" (Italics added.) (Goings v. United States (8th Cir. 1967) 377 F.2d 753, 762 fn. 12.)

The emphasized language of the federal court focuses on the true issue before us. We do not here inquire, as a matter of the law of evidence, whether prior inconsistent statements of a witness should or should not be admitted as substantive proof. That disagreement between the academic community and the courts has been settled in this state by the Legislature's enactment of section 1235 of the Evidence Code, and we cannot review the wisdom of its solution. "The power of the legislature to determine what is or is not competent evidence in civil or criminal cases is

unquestionable." (People v. Buckley (1904) 143 Cal. 375, 393 (Beatty, C.J., concurring).)

But that power, while unquestionable, is not unlimited, and remains subject to the restrictions placed upon it by the state and federal constitutions. (Miller & Lux v. Secara (1924) 193 Cal. 755, 766.) "The courts, as custodians of the judicial powers of government, are not obliged to enforce a statute which through a rule of evidence arbitrarily deprives a litigant of his rights, or which permits a defendant to suffer conviction without due process of law." (People v. Murguia (1936) 6 Cal.2d 190, 193.) Indeed, in recognition of this principle section 1204 of the Evidence Code declares that "A statement that is otherwise admissible as hearsay evidence *is inadmissible against the defendant in a criminal action* if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California." (Italics added.) The typical case governed by the statute is that of an admission or confession of a defendant obtained by coercion or in violation of his right to counsel, but "its principle is made applicable to all hearsay statements." (Evid. Code, § 1204, comment of Assembly Committee on Judiciary.)

The issue, then, is whether the substantive use of the prior inconsistent statements of Elaine and Mrs. Johnson, although "otherwise admissible" under section 1235, violated the constitutional rights of this "defendant in a criminal action." The United States Supreme Court has squarely stated that extrajudi-

cial statements of a witness, while admissible for impeachment purposes, "certainly would not be admissible in any criminal case as substantive evidence. [Citations.] So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded." (Fns. omitted.) (Bridges v. Wixon (1945) 326 U.S. 135, 153–154.)

Equally clear is the court's commitment to preserving an essential guarantee of such fairness—the right to cross-examination—against all encroachments, however innocuous they may seem on their face. Thus in Greene v. McElroy (1959) 360 U.S. 474, 496–497, the court declared that while the individual's opportunity to demonstrate the untruth of the government's case against him "is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.[8] We have formalized these protections in the requirement of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion." (Fn. omitted.) A recent example of such zeal is Smith v. Illinois (1968) 390 U.S. 129, in which the court struck down a state narcotics conviction for violation of the confrontation clause although the defendant's right to cross-

[8] It will be remembered that vindictiveness and jealousy were among the motives which, according to Elaine and Mrs. Johnson, impelled them to testify falsely against defendant at the grand jury hearing.

examine the chief prosecution witness was neither denied nor delayed but was simply curtailed by the exclusion of questions asking the witness his name and address: "To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." (*Id.* at p. 131.) And here again the "former testimony" cases are instructive: even when that testimony was taken at a hearing in which the defendant had a complete and adequate opportunity to cross-examine with the assistance of counsel, the court held that its introduction at a subsequent trial violates the constitutional right of confrontation if the witness' absence was due to the negligence of the prosecution in allowing his escape (Motes v. United States (1900) 178 U.S. 458, 471–474) or its failure to make a good faith effort to compel his attendance by various procedural means (Barber v. Page (1968) ____ U.S. ____ [36 U.S. L.Week 4329]). In the latter decision the court observed (at p. ____ of ____ U.S. [36 U.S.L. Week 4331]) that "The right of confrontation may not be dispensed with so lightly."[9] These rulings em-

[9] The court also took the occasion to cast doubt on the widely held assumption that cross-examination at a preliminary hearing, as distinguished from a trial, is constitutionally adequate to permit subsequent use of the witness' direct testimony under the "former testimony" exception: "Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined [the incriminating witness] at the preliminary hearing. . . . The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weight the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." (*Ibid.*) The function of the grand jury hearing, of course, is no less limited.

phasize the high court's belief in the importance of ensuring the defendant's right to conduct his cross-examination before a *contemporaneous* trier of fact, i.e., before the same trier who sits in judgment of the truth of the witness' direct testimony as it is spoken from the stand. (See also Bruton v. United States (1968) 36 U.S.L.Week 4447.)

In light of these decisions, can we say here that the Sixth Amendment is satisfied when the defendant's opportunity to conduct a cross-examination of the evidence against him is restricted to a time three years after the evidence was given and to a place in which it is judged by a wholly different tribunal? Does the superficial form of such an opportunity to cross-examine rise to the level of constitutional substance? In short, is that opportunity constitutionally "adequate"? We conclude that it is not. Evidence Code section 1235, when applied against a defendant in a criminal case, results in the kind of erosion of the right of cross-examination that neither the United States Supreme Court nor this court will countenance.

We turn, finally, to the question of prejudice. Had defendant been denied the right to cross-examine testimony given directly from the witness stand at his trial, the ruling would have been " 'constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " (Smith v. Illinois (1968) supra, 390 U.S. 129, 131, quoting from Brookhart v. Janis (1966) 384 U.S. 1, 3.) But we are dealing here with a witness' prior inconsistent statements, a category of evidence which may run the gamut from extremely damaging to trivial and insignificant. When such statements are introduced for

their traditional purpose of impeaching the witness, they may have little effect on the guilt-determining process. Accordingly, the erroneous admission of such a statement as substantive evidence does not automatically deprive the defendant of a fair trial, and the conviction will be reversed only in those cases in which prejudice ensued.

Nevertheless the error is of federal constitutional dimensions, and hence the governing test of prejudice is that laid down in Chapman v. California (1967) 386 U.S. 18. Applying that test, we find the People have not proved that the substantive use of the prior inconsistent statements here challenged was "harmless beyond a reasonable doubt." (*Id.* at p. 24.) Indeed, a clearer case of prejudice could not be imagined, for these statements constituted the *sole* evidence that an act of intercourse had taken place as charged.[10] Not surprisingly, it appears from the face of the record that the People's case presented considerable difficulty to the jury: they consumed many hours in deliberations, called for the transcripts of the grand jury testimony, and returned to the courtroom a number of times, evenly deadlocked, before they were able to reach a verdict. That the jury thus hesitated to convict a man of a serious crime on out-of-court testimony of this nature is a credit to their prudence and good sense.

[10] This void is not filled by Elaine's direct testimony that she participated in manual sex play with defendant on the night in question. That evidence was doubtless relevant to the issue of intent or disposition, but the jury were correctly instructed that defendant could be found guilty of incest only if he had actual sexual intercourse with Elaine. (Pen. Code, § 285.)

Our disposition renders moot defendant's contention that section 1235 cannot constitutionally be applied to him on the additional ground of the ex post facto clause. Nor need we resolve certain other points raised in the briefs, as a retrial on the facts and law herein analyzed would be futile.

The judgment is reversed.

MOSK, J.

WE CONCUR:

TRAYNOR, C. J.
McCOMB, J.
PETERS, J.
TOBRINER, J.
BURKE, J.
SULLIVAN, J.

APPENDIX C

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

[YOLO]

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
EDWIN C. S. JOHNSON,
Defendant and Appellant.

3 CRIM. 4447

FILED: DEC. 29 1967

On February 7, 1964, the Grand Jury of Yolo County accused defendant of a violation of section 285 of the Penal Code (incest). Defendant thereafter entered a plea of guilty and judgment was pronounced. On July 28, 1966, by order of the United States District Court, the proceedings were set aside. Defendant was again arraigned, and on January 24, 1967, trial was commenced. On February 1, 1967, defendant was found guilty by a jury of a violation of section 285 of the Penal Code, and on February 17, 1967, judgment of conviction and sentence was pronounced. He appeals from this judgment.

The facts are as follows: On the night of January 11, 1964, Elaine, age 15, was at home, where she lived with her parents and six brothers and sisters. At the present trial, she testified that on that night her father,

the defendant, fondled her breasts and private parts and that she had masturbated him. She also admitted isolated instances of sexual conduct short of intercourse on occasions prior to January 11, 1964. At the trial, Elaine denied ever having sexual intercourse with her father.

The People then introduced evidence of prior inconsistent statements given under oath before the Yolo County Grand Jury on February 7, 1964. This testimony revealed that on January 11, 1964, Elaine had sat up with her father after the family had retired. Defendant undressed her and the two had sexual intercourse. Penetration was effected. Elaine also testified to acts of sexual intercourse with defendant at least a half dozen times on occasions between June and September of 1963 when her mother was present. Additional acts committed with defendant after her mother became aware of their relationship were committed at night, or when her mother was working. Defendant had explained to Elaine that it was better for him to do it with her than to go out with a prostitute.

In accounting for the difference in her testimony, Elaine stated that her testimony before the Grand Jury had been suggested and coerced by former District Attorney Thomas Purtell, who promised psychiatric care for defendant. Purtell, however, testified that the statements made to him, which were similar to the Grand Jury testimony, were made without promises or requests to slant or color her testimony. Elaine denied being interviewed by Lieutenant Gorman of the sheriff's office, at which time, according to the testimony of Gorman, Elaine stated that she had engaged in acts of sexual intercourse with her father.

Eleanor Johnson, wife of defendant, also testified at the trial. She denied any knowledge of sexual activities of any sort between her daughter and defendant. As with her daughter, Elaine, prior inconsistent statements before the Yolo County Grand Jury were introduced which revealed that she was aware of sexual activities between the two. Mrs. Johnson first discovered this conduct in late 1961 when she walked into the bedroom and discovered defendant's hand inside the top of her daughter's pajamas. Defendant told her that he had been intimate with Elaine. He explained that Eleanor's working schedule made her absent and caused her to be tired as a result of which he got his sexual relief from Elaine in lieu of going outside the home. The difference in Mrs. Johnson's testimony was explained by her as an exaggeration.

According to her Grand Jury testimony, defendant's wife made the effort to improve their relations to the point that she became pregnant in February. In August of 1962, however, she discovered her daughter nude in bed with defendant. This conduct was explained by defendant as caused by his wife's tired condition and her pregnancy. Thereafter, Mrs. Johnson would sometimes send Elaine to defendant, at his request, on the pretense of taking some coffee to him.

There were also occasions when the three parties would be in bed together. Sometimes Mrs. Johnson would leave; other times she would remain. Defendant would fondle the two of them and Mrs. Johnson observed Elaine lying on top of defendant and defendant lying on top of Elaine. In explanation of her testimony that she falsely accused defendant of incest, Mrs. Johnson alleged that she had been coached by the district attorney who had told her that an inces-

tuous relationship between defendant and Elaine would have to be shown if defendant were to get psychiatric treatment of any sort.

Thereafter she staunchly maintained that Lieutenant Gorman of the sheriff's office had planted the seed of incest in her mind. It subsequently appeared that Mrs. Johnson originally revealed defendant's conduct to a Mrs. Griffis, who had charge of the Yolo County Receiving Home for neglected and abandoned children. Mrs. Johnson appeared neither vindictive, spiteful nor revengeful toward her husband when that disclosure was made. Mrs. Griffis told the authorities what Mrs. Johnson had disclosed to her.

Defense evidence consisted of testimony given by three brothers of Elaine, who stated that she had a poor reputation for truth and veracity. Through cross-examination of Elaine and her mother, defendant sought to show that both Mrs. Johnson and her daughter were biased and that both had been improperly coached by the district attorney's office. Defendant did not take the stand in his own behalf.

Counsel for defendant urges ten grounds of error. Defendant, in propria persona, has filed with this court a document entitled "Appellant's Rebuttal in answer to Respondent's Brief" in which he urges fifteen "grounds for reversal." This latter document raises a number of arguments not asserted by counsel. "*Pro se* documents filed by a defendant who has counsel of record will not be recognized, and we need not enumerate or discuss [his] contentions." (People v. Clayton, 218 Cal.App.2d 364, 369, citing People v. Mattson, 51 Cal.2d 777, 798.) This opinion will consider only the contentions raised by defendant's counsel. We have, however, noted defendant's added contentions and find them to be without merit.

We turn first to the contention that the trial court committed error in applying section 1235 of the Evidence Code (new), which code became operative on January 1, 1967, and governs proceedings in actions brought on or after that date. (Evid. Code, § 12.) Prior to the adoption of this code the California rule was that prior inconsistent statements were admissible only for impeachment purposes and had no independent value as affirmative evidence. Section 1235 of the code makes such statements admissible as an exception to the hearsay rule with independent substantive value, and such statements are now admissible to prove the truth of the matter stated.

Section 1235 [1] of the Evidence Code provides:

"Evidence of a statement made by a witness is not inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

Section 770 of the Evidence Code provides:

"Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness

[1] This section is explained by the Law Revision Commission Comment as follows:

"Under existing law, when a prior statement of a witness that is inconsistent with his testimony at the trial is admitted in evidence, it may not be used as evidence of the truth of the matters stated. Because of the hearsay rule, a witness' prior inconsistent statement may be used only to discredit his testimony given at the trial. Albert v. McKay & Co., 174 Cal. 451, 456, 163 Pac. 666, 668 (1917).

"Because a witness' inconsistent statement is not substantive evidence, the courts do not permit a party—even when surprised by the testimony—to impeach his own witness with inconsistent statements if the witness' testimony at the trial has not damaged the party's case in any way. Evidence tending only to discredit the witness is irrelevant and immaterial when the witness has not given damaging testimony. People v. Crespi,

that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

"(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

"(b) The witness has not been excused from giving further testimony in the action."

The Evidence Code creates a new exception to the hearsay rule by permitting the prior inconsistent statements of a witness to be received for the truth of the matter stated.

Defendant maintains that this was not the law at the time of the alleged offense with which he was charged, nor the law at the time of his plea, and argues that section 1235 was unconstitutionally applied to his trial in that it constitutes an ex post facto law as so applied. An ex post facto law is a retrospective statute applying to crimes committed before its enactment, substantially injuring an accused, and the passage of such a law is prohibited by the Constitution. (See U.S. Const., art. I, §§ 9, 10; see also Cal. Const., art. I, § 16.)

---

115 Cal. 50, 46 Pac. 863 (1896); People v. Mitchell, 94 Cal. 550, 29 Pac. 1106 (1892); People v. Brown, 81 Cal.App. 226, 253 Pac. 735 (1927).

"Section 1235 permits an inconsistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible under the conditions specified in Section 770—which do not include surprise on the part of the party calling the witness if he is the party offering the inconsistent statement. Because Section 1235 permits a witness' inconsistent statements to be considered as evidence of the matters stated and not merely as evidence casting discredit on the witness, it follows that a party may introduce evidence of inconsistent statements of his own witness whether or not the witness gave damaging testimony and whether or not the party was surprised by the testimony, for such evidence is not longer irrelevant (and, hence, inadmissible).

"Section 1235 admits inconsistent statements of witnesses

Defendant cites Calder v. Bull, 3 Dall. 386-401 [1 L.Ed. 648], wherein the court, at page 650, sets forth one type of law which it characterizes as ex post facto: "Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender." Witkin notes, however, that "[s]ubsequent cases have indicated that the statute is invalid only if it punishes an act innocent when done, increases the punishment or deprives a person of a defense," citing Beazell v. Ohio, 269 U.S. 167 [46 S.Ct. 68, 70 L.Ed. 216]. (3 Witkin, Summary of California Law, § 95, p. 1894.) A recent United States Supreme Court case defines an ex post facto law as follows: "An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action;' 'that *aggravates a crime,* or makes it *greater* than it was, when committed.' " (Bouie v. Columbia, 378 U.S. 347, 353 [12 L.Ed.2d 894, 899-900].) Although the court cites Calder as authority for this statement, it omits any

---

because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matters. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case."

of changes in evidence or procedure, as set
in Calder.

which comments further (*ibid.*, p. 1895): "Earlier
such as Calder v. Bull, supra, expressed the view
a retroactive change making less or difference
admissible to convict would be *ex post facto*.
present rule is settled, however, that a change in
of evidence or procedure is not invalid unless
deprives the defendant of some *substantial protec-*
(Beazell v. Ohio, supra.) Thus the following
retroactive laws have been upheld: Statute permitting
introduction of a defendant's letters for comparison
handwriting (Thompson v. Missouri (1897) 171
98, 18 S.Ct. 922, 43 L.Ed. 204); statute enlarg-
the class of persons competent to testify by per-
mitting testimony of a felon (Hopt v. Utah (1883)
S. 574, 4 S.Ct. 202, 28 L.Ed. 262); statute pro-
viding for joint trials of persons jointly indicted,
where formerly separate trials could be demanded
(Beazell v. Ohio, supra); California constitutional
amendment giving trial court power to comment on
the evidence (People v. Talkington (1935) 8 C.A.2d
P.2d 368); P.C. 190.1, providing for separate
determinations of guilt and penalty in murder cases
(People v. Ward (1958) 50 C.2d 702, 706, 328 P.2d

In Hopt v. People of Utah, 28 L.Ed. 262, 268–269,
the court said:

"But it is insisted that the Act of 1882, so con-
strued, would, as to this case, be an *ex post facto*
law within the meaning of the Constitution of the
United States, in that it permitted the crime charged
to be established by witnesses whom the law, at the
time the homocide was committeed, made incompe-
tent to testify in any case whatever.

"

". . . . . .

". . . Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to this passage; for they do not attach criminality to any act previously done and which was innocent when done; nor aggrevate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

"The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but, leaving untouched the nature of the crime and the amount or degree of proof essential to conviction, only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can

be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged."

In Thompson v. Missouri, supra, 171 U.S. 380 [18 S.Ct. 922, 43 L.Ed. 204, 207–208], the court said: "If persons excluded, upon grounds of public policy at the time of the commission of an offense, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed. The Missouri statute, when applied to this case, did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offense criminal that was not criminal at the time he committed the murder of which he was found guilty. It did not change the quality or degree of his offense. Nor can the new rule introduced by it be characterized as unreasonable—certainly not so unreasonable as materially to affect the substantial rights of one put on trial for crime. The statute did not require 'less proof, in amount or degree,' than was required at the time of the commission of the crime charged upon him. It left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state, as a condition of its right to take the life of an accused, must overcome the presumption of his innocense and establish his guilt beyond a reasonable doubt. Whether he wrote the prescription for strych-

nine, or the threatening letter to the church organist, was left for the jury, and the duty of the jury, in that particular, was the same after as before the passage of the statute. The statute did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. . . . We cannot adjudge that the accused had any vested right in the rule of evidence which obtained prior to the passage of the Missouri statute, nor that the rule established by that satuate entrenched upon any of the essential rights belonging to one put on trial for a public offense.

". . . We mean now only to adjudge that the statute is to be regarded as one merely regulating procedure, and may be applied to crimes committed prior to its passage without impairing the substantial guarantees of life and liberty that are secured to an accused by the supreme law of the land."

Although no California case has been found precisely in point, it was early decided that laws changing mere forms of procedure in a criminal action are not ex post facto, and that no constitutional difficulty is encountered in requiring past offenses to be tried under new forms of procedure. (People v. Mortimer, 46 Cal. 114, 118; see also People v. Campbell, 59 Cal. 243, 245–246.) In Campbell, the court noted (citing Cooley on Constitutional Limitations, p. 331) that the Legislature could not dispense with any of the substantial protections with which the existing law surrounds a person accused of crime. In view of the authorities cited herein, the application of section 1235

did not in our opinion deprive the defendant of any "substantial protections" for he was in no way deprived of a fair and impartial trial. Further, the legislation in question did not alter the rules of evidence by requiring less or different evidence than the law required at the time of the commission of the offense. (See People v. Ward, 50 Cal.2d 702, 710.) The change in the law did not deprive defendant of a protection in actual existence at the time of the crime, because at that time the incriminating testimony of these two witnesses was available for prosecution use and was admissible in evidence against him. The subsequent change in the law only preserved this availability and admissibility against the effect of an intervening retraction. Defendant's ex post facto claim seeks to capture an advantage from the retraction, not to protect him from incriminating evidence which was unavailable or inadmissible at the time of the crime. We therefore hold that the use of section 1235 as so applied did not constitute an ex post facto law. (See Thompson v. Missouri, supra, 171 U.S. 380 [18 S.Ct. 922, 43 L.Ed. 204, 207–208].)

Defendant next argues that section 1180 of the Penal Code precluded the trial court from employing the new evidence rule. This section provides, in part: "The granting of a new trial places the parties in the same position as if no trial had been had." It is not clear, as defendant contends, how the new Evidence Code violates this section. In our view the use of the new code is, in fact, in compliance with section 1180 of the Penal Code. Furthermore, section 12 of the Evidence Code provides that the code, which became operative on January 1, 1967, governs proceedings brought on or after that date and specifically provides that a new

trial commenced on or after January 1, 1967, shall be governed by the code. Defendant's trial commenced on January 24, 1967. (See People v. Stanley (Nov. 29, 1967) 67 A.C. 837.) We find no error here. (See People v. Doherty, 67 A.C. 1, 13, fn. 9.)

Defendant next contends it was error for the trial court to refuse to admit evidence offered by defendant to establish that Elaine had made a complaint, in a statement signed by her, of sexual misconduct against one Edwin L. Rudolph, who would testify that the charge was false. Elaine (on *voir dire*) testified her allegation against Rudolph was true. Defendant also offered to show Elaine had made a false accusation against another male person (an allegation by Elaine that he was the father of her illegitimate child). He cites People v. Hurlburt, 166 Cal.App.2d 334, in support of his contention. Hurlburt is not applicable here. The court there held that in a prosecution for lewd conduct with a nine-year-old girl it was reversible error to refuse to permit cross-examination of the child or introduction of evidence of similar charges made by her in the past against other men, *which charges* were admittedly false or were proved to be false.

In the case before us the charges were not ones which the witness had admitted were false or were proved false. Elaine maintained that Rudolph did attempt to sexually molest her and the district attorney testified on *voir dire* that although his office made an investigation of the matter, he was not satisfied that the accused either did or did not commit these acts. He merely felt that there was insufficient evidence to prosecute.

Hurlburt is distinguishable on other grounds. This is not a case involving a single small child accusing an adult of sexual misconduct. Here, the grand jury testimony of Elaine was clearly corroborated by the testimony of the mother. Thus, there is here much more than the testimony of a young child and the denials of a defendant. Secondly, Elaine did not instigate the charge of incest, and thus, technically, she was not the prosecutrix. Rather, the complaint came to the attention of the authorities through a county official, Mrs. Griffis, who had received this admission, not as a charge filed by Elaine, but as one made by Elaine's mother. Thirdly, the witness here did not admit the charges were false. Rudolph's denial, even if he had been allowed to testify, would not necessarily prove the falsity of the charges. Hence it would not appear that the court erred in excluding the testimony in question. (Cf. People v. Buchel, 141 Cal.App.2d 91, 94–95.)

Defendant next urgers error in the admission of the testimony of witness Joanne Griffis, who was called as a witness for the prosecution, alleging it to be hearsay and nonimpeaching. The facts are to the contrary.

Mrs. Eleanor Johnson allegedly made a statement to Mrs. Griffis, a county employee in charge of the receiving home for children, when she left her home one night after an altercation with defendant. On the stand, Mrs. Johnson, called as a witness for plaintiff, stated she may have talked to Mrs. Griffis, but couldn't remember what she said. She also stated that the incest idea was originally conceived by one of the police officers. It would thus appear that impeachment was

proper (see People v. Young, 70 Cal.App.2d 28, 34), both to show a conversation was had and that the instigation for the charges came from Mrs. Griffis and not the officer.

It should also be noted that the defense attempted to show that Mrs. Johnson acquiesced in the incest prosecution only because of her rage and vindictiveness toward defendant. Thus the conversation was necessary to establish Mrs. Griffis as a person competent to testify to Mrs. Johnson's demeanor at the time. Mrs. Griffis' testimony, given after that of Eleanor Johnson, which was impeaching, was that Mrs. Johnson was not bent upon her husband's conviction out of a sense of vindictiveness. To the contrary, Mrs. Griffis testified she knew the Edwin Johnson family; that Elaine had been placed in the receiving home at one time and the mother Eleanor Johnson had sought refuge in this home at another time; that the mother appeared at the home several months later in a severely beaten and bruised condition; that she appeared frightened and related her story of the defendant's intimate relations with Elaine; that on this occasion the mother was crying, rather quiet, submissive, resigned, not vindictive or spiteful toward her husband. Such evidence would appear to be proper to show the existence or nonexistence of bias. (Evid. Code, §§ 780, 785.)

Defendant also claims, however, that this testimony constituted hearsay. This testimony constitutes a prior inconsistent statement, under section 1235 of the Evidence Code. (See also Evid. Code, § 770.) Though Mrs. Johnson did not deny making statements to Mrs. Griffis, she was unable to recall the events. In such a situation, this exception to the hearsay rule should

apply in order to fully ascertain the truth of the matter. Secondly, Mrs. Johnson did testify that it was a police officer who conceived the idea of incest—not that she told Mrs. Griffis of the facts which Mrs. Griffis later imparted to the authorities. This is a prior inconsistent statement which may come in under section 1235 of the Evidence Code.

We have examined the remaining contentions of defendant and in the light of the record find them to be without merit.

The judgment is affirmed.

REGAN, J.

We concur:

PIERCE, P. J.

FRIEDMAN, J.